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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 90

CARLOTA BENITEZ SAMPAYO,
Petitioner,

vs.

THE BANK OF NOVA SCOTIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONER,

FERNANDO B. FORNARIS,
ELMER MCCLAIN,
Counsel for Petitioner.

FRANCISCO CAPO PAGAN,
Of Counsel.

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Reasons on Which the Discretion of This Court is Invoked to Permit the Filing of This Reply Brief.

As stated in the final brief for petitioner herein, which the present one aims to supplement, in his letter dated November 14, 1940, the Clerk of this Court notified the undersigned local counsel that the question on which this case should be briefed and argued in this Court is "whether in a proceeding under Section 75 of the Bankruptcy Act the definition of the term 'farmer' is to be determined by Sec-

tion 75 (r) of that Act or by Section 1 (17) of the Chandler Act."

The existence of such limitation is acknowledged by present counsel for the respondent in his final brief. A printed copy of said final brief not having as yet been furnished to the undersigned local counsel, it is impossible to resort to page references. The acknowledgment of the existence of such limitation by present counsel for the respondent appears under Footnote 3 incorporated towards the beginning of respondent's said final brief.

On November 18, 1940, the undersigned local counsel addressed himself to the Clerk of this Court inquiring as to whether his understanding to the effect that the limitation referred to above precluded the raising of even jurisdictional questions.

In his letter dated November 23, 1940, in replying to that question, the Clerk of this Court stated: "If there are questions of jurisdiction in the case, I do not think that you should construe the court's instruction as precluding a consideration thereof for such questions are always open. I might suggest that you confine your main brief to the question which the court indicated should be discussed and if the respondent raises additional questions you will have an opportunity to present argument thereto in a reply brief."

The undersigned local counsel has just received a typewritten copy of the brief filed herein by present counsel for the respondent. In said final brief not only are raised questions other than the one to which briefing and argument was expressly limited by this Court but, besides, certain procedure is resorted to whereby various other questions are brought before this Court, without facts being set forth exactly as they are.

The undersigned local counsel verily belives that the procedure thus resorted to by present counsel for the respond-

ent and to be hereinafter explained in detail, represents such an attempt to deviate from the instructions referred to above, as to justify a prayer to the effect that the final brief filed by present counsel for the respondent be stricken from the record. Nevertheless, rather than resorting to that extreme procedure, it would seem preferable to try and correct the situation thus created, through the filing of this reply brief.

It seems in order to digress here to point out that the repeated references resorted to above to "present" counsel for the respondent originates from the fact that while in the brief filed herein on behalf of the respondent in opposition to the granting of the writ of certiorari, J. Henri Brown, Esq., senior partner of the law firm of Brown, Gonzalez and Newsom, appeared as counsel for the respondent, in the typewritten copy of the final brief for respondent furnished to the undersigned local counsel, Mr. Brown—an attorney duly authorized to practice before this Court—appears simply as "Of Counsel", while Walter L. Newsom, Jr., Esq., appears as the present counsel for the respondent. No official notice reflecting such change has ever been served on the undersigned local counsel.

The questions which the undersigned local counsel believes should not have been included in the final brief for the respondent, taken in the order in which they appear in the typewritten copy of said brief, which, as already stated, is the only one thus far furnished to undersigned local counsel, are as follows:

(a) *Fourth paragraph.* That petitioner herein "*based her claim to be a 'farmer'* on (1) the fact that at her home in the city of Ponce, Puerto Rico, *where she lives with her husband, she had been for the past year and a half* (i. e. from approximately April 22, 1937) (1) *engaged in a small way* in raising and selling poultry and eggs from which she derived a profit of about $50.00 per month (R. 21, 59);

and (2) on the additional fact that she owned an interest in a large enterprise situated in the island of Vieques devoted to the production of cane sugar and molasses from sugar cane *grown by it and independent farmers* (colonos) *financed by the enterprise* (R. 21, 22, 59). Her interest consisted of a *one-twelfth share* in the *contractual* Comunidad José J. Benítez e Hijos *which had large holdings of land in Vieques, cattle buildings and agricultural equipment and owned and held the capital stock of the Benítez Sugar Company, a corporation. The corporation and "Comunidad" for many years had been conducted 'as a single and integrated enterprise'"* (R. 21, 22, 53, 54). (Emphasis or Italics has been resorted to in order to indicate the portions objected to.)

We respectfully submit to this Court that the portions extracted and transcribed under (a) hereinabove are altogether disconnected from the only issue to which briefing and argument was expressly limited by this Court.

We took issue with most if not all of those matters that counsel for the respondent now pretends to set forth as absolute facts, through the petition for rehearing seasonably filed before the Circuit Court of Appeals. Said petition for rehearing was certified to this Court but was omitted from the printed record.

In addition to having instructed us not to deal with those features, most, if not all of which, were presented through the petition for writ of certiorari filed herein, we now have that the majority of those portions of the record which must be referred to, in order to sustain our contentions in the premises, were eliminated from the printed record, upon designation as to contents thereof filed by the respondent, (to which petitioner herein objected) through order of this Court.

To the foregoing it seems in order to add that the issue as to whether a "Comunidad de Bienes", as defined by the

Civil Code of Puerto Rico, is or is not a partnership, (covered by footnote 2 appearing in said final brief) has also been injected, in utter disregard of the instructions hereinbefore referred to. Although the case cited in said footnote 2 is entitled *Benítez* v. *Bank of Nova Scotia,* petitioner herein *was not a party thereto.* On the contrary, the decision thus cited was rendered in connection with an appeal with which petitioner herein was not at all concerned.

(b) Undersigned local counsel further takes exception to the statement advanced by counsel for the respondent to the effect that the Circuit Court of Appeals "expressly refrained from deciding whether petitioner would have qualified as a 'farmer' as that term was (?) defined in Section 75(r) of the Act." (Question mark ours.)

Reference to the decision itself (R. 59, *et seq.*) will show that the Circuit Court of Appeals did enter into various other questions, which questions were either entirely disconnected from the question as to the applicable definition of "farmer" or else were equally applicable under either of the two definitions. In this connection it is altogether significant to note the view expressed in that respect by the Circuit Court itself in said case entitled *Benítez* v. *Bank of Nova Scotia,* (C. C. A. 1st) cited in said footnote 2 (110 F. (2) 169). In the course of the opinion rendered in that case, the Circuit Court of Appeals said:

> "See *Carlota Benítez Sampayo* v. *Bank of Nova Scotia* (C. C. A. 1st Cir.) 42 Am. B. R. (N. S.) 267, 109 F. (2d) 743, decided by us January 10, 1940. In that case we did not find it necessary to pass on the question, because THE ONLY MATTER FOR DECISION ON THAT APPEAL WAS THE CORRECTNESS OF A DECREE BELOW DISMISSING THE INDIVIDUAL PETITION UNDER SECTION 75 ON THE GROUND THAT DEBTOR WAS NOT A 'FARMER' WITHIN THE MEANING OF THE ACT." (Capitals supplied.)

Reference to the opinion rendered by the Circuit Court of Appeals upon petition for rehearing (R. 68) will develop the ominous fact that the Circuit Court of Appeals felt that everything pertaining to the issue as to "farmer" had been decided under either of the two definitions. Were it not so, the Circuit Court would have hardly resorted to citing in its said opinion upon petition for rehearing the extreme case of *Shyvers* v. *The Security First National Bank*, 108 F. (2d) 611, which case had been decided by the Circuit Court of Appeals for the Ninth Circuit as late as December 21, 1939. The statement made by the Circuit Court (R. 68) at the time, to the effect that if the opinion rendered in that extreme case (dealing with an absentee landlord who did nothing but collect rentals while living in England) is correct, then petitioner herein "would seem not to be a 'farmer' EVEN UNDER THE DEFINITION OF SECTION SEVENTY-FIVE (R)", seems quite definite in establishing the opinion of the Circuit Court of Appeals to the effect that petitioner herein qualified as a farmer under Section 75(r) unless the decision in that extreme case could be applied to the altogether different facts in the present case. (Capitals supplied.)

Another explanation of the position assumed by the Circuit Court of Appeals might be found in the fact that the District Court having decided the issue as to jurisdiction on the premise that it was the other definition of farmer in Section 1 (17) that applied, said Appellate Court must adhere to the theory on which the case was tried and decided in the District Court. (*Valley Shoe Corporation* v. *Stout* (C. C. A. Mo., 1938) 98 F. (2d) 514.

(c) Undersigned local counsel further objects to the statement appearing under footnote 4 of said typewritten brief in which it is stated that "a further reason for limiting the question to one of interpretation no doubt is the fact that the complete record below was not filed in this Court."

Eminent counsel for the respondent certainly may not take advantage of his own act in promoting the diminution of the record to be printed, as he now pretends. The complete record, as required to pass on all the questions raised in the District Court and in the Circuit Court of Appeals (other than those pertaining to the correction of the record, raised exclusively by petitioner herein) has not been printed, because of the objections raised by counsel for the respondent, but the certified copy of such record is nevertheless before this Court and may be referred to, should this Court decide to do so.

(d) The undersigned local counsel strongly objects to the incorporation of a considerable portion of the brief filed by counsel for the Respondent in the Circuit Court of Appeals, in the form of an appendix, under the pretence that inclusion of such irrelevant matter is necessary in order to establish that we did not cite correctly from said brief in the final brief for petitioner. Even casual examination of the additional matter thus included in the said appendix will prove that it does not affect either one way or another the citations resorted to by us from said brief on appeal and which are repeated therein.

Our objection is not based principally upon the general principle involved, but primarily upon the damaging fact that some of the statements thus injected into the final brief for the Respondent are contrary to the facts of the case.

In the final brief for petitioner filed by us some time ago, the following statement appears towards the end of Part I of the Preliminary Considerations:

> "To the foregoing we might add that we do not agree with certain other statements or innuendoes incorporated in said Brief in Opposition. However, the issue having been limited by this Court to the question of the applicable definition of 'farmer', we have not

deemed it necessary to go into those other details. On the other hand, the clarification of the situation referred to above being altogether important, we have felt in duty bound to bring such situation before this Court in its true light. It is just because the task is one of the many disagreeable ones imposed by the profession, that we have disposed of it at the outset."

Now that counsel for the Respondent has incorporated in the said appendix some of the statements and innuendoes referred to above, undersigned local counsel feels once more in duty bound to clarify and even challenge such statements as do not reflect a true and correct expression of the facts, as they actually exist.

In the typewritten copy of the brief which, as already stated, is the only copy thus far received by the undersigned local counsel of Respondent's final brief, it is stated that counsel for the Respondent did not know that the "transcript of the testimony", formed part of the record herein and that eminent counsel has not seen the copy thereof filed herein.

As much as we regret to have to state it, we must, nevertheless state that counsel for the Respondent was seasonably informed through our brief that what we filed herein is a CERTIFIED COPY of the Court Reporter's Transcript of the evidence produced and proceedings had at the time of the final hearing had before the District Court on December 27, 1938 and which resulted in the decree which petitioner herein aims to have reversed.

Said Reporter's Transcript was obtained from the Clerk of the Circuit Court of Appeals and mailed to the Clerk of this Court, on the strength of the authority granted through the letter which said Clerk addressed to the

undersigned local counsel on November 14, 1940, from which letter we extract the following:

> "In view of this limitation you may determine whether or not the 'Reporter's Transcript' referred to on page 8 of your Petition for Instructions becomes material and if so you may make it available for the inspection of the Court should the Justices determine that it is properly before them."

True and exact copy of said Petition for Instructions in which leave to file said "Reporter's Transcript" was requested, was, of course, served on counsel for the Respondent, in due course, as shown therein. On the other hand, the second paragraph of the letter of the Clerk of this Court from which we have just transcribed, follows the paragraph from that same letter cited "haec verba" by present counsel for the Respondent under footnote 3 appearing towards the beginning of the carbon copy of Respondent's final brief. Evidently, counsel for the Respondent overlooked these important features which would have given him the necessary information which he is apparently lacking as to the status of said "Reporter's Transcript" and the authenticity of same.

We shall now proceed to establish through said "Reporter's Transcript", (to be designated in citing simply as (R.T.) how some of the allegations incorporated in said appendix, fail to conform with the facts, as they actually are:

Following the same procedure hereinbefore established, it being that, as already stated, it is impossible to resort to page references, we shall proceed to discuss such statements as are contrary to the facts of the case, in the order that they appear in the appendix, beginning with paragraph B, entitled, "Appellant's Poultry Business."

Towards the beginning of said paragraph it is stated that petitioner's poultry operations "are not a matter

of basic and prime importance to her." That petitioner stated that she is not a business woman but had a finishing school education.

The record shows the following in connection with these remarks:

"Q. Now then, when did you start this poultry business, Mrs. Seix?

A. I have had it for over two or three years.

Q. How did you start this business?

A. I started it because I liked it and then it turned out to be a good business and I decided to carry it on as a business, on a business basis." (R.T., p. 16.)

"Q. And how many pigeons do you have now?

A. I have over two hundred.

The Court: Do you sell your pigeons?

A. Yes, sir, I sell pigeons, and I sell squabs.

Q. And I suppose you sell eggs?

A. I sell eggs and I sell chickens.

Q. And what is your annual income from that business?

A. I only carry notes. At the end of the month I know what I got. I never thought of it as annual. I get about fifty or sixty dollars monthly, all together, as profits.

Q. How long have you been making profits of fifty or sixty dollars a month, Mrs. Seix?

A. About a year and a half.

Q. That comes to approximately $600.00 a year?

The Court: That is a matter of mathematics. Fifty dollars a month, six hundred dollars a year.

Q. Now, do you operate this business, yourself?

A. Yes, I do, personally.

Q. Where did you learn the business, Mrs. Seix?

A. I don't know. I used to get books from the States and I follow what the rules say, and what I ought to do, and I think I am pretty good at it, and I like it and enjoy it." (R.T., pp. 17, 18.)

* * * * * * *

"Witness: Some of those questions I really do not understand, because they are complicated. I didn't have a business education. I had a finishing school education." (R.T., p. 23.)

In the following paragraph it is remarked that by the time of the hearing petitioner's stock of poultry increased to the extent of more than 100%, "although the record shows no amendment of her schedules." The record certified to this Court does show that petitioner herein seasonably prayed the District Court for leave to file amended Schedules and that such leave was denied.

In the following paragraph it is stated that the record fails to show that petitioner herein "devoted any substantial part of her time or energies to her poultry." The following is to the contrary:

"Q. Can you tell the court more or less how many chickens have you bought and sold during that period of time?

A. I could not tell exactly because I sell most every day.

Mr. Newsom: I think that is irrelevant, your Honor.
The Court: Well, it shows the method of operation.

A. (Continued) I would have a larger flock if I didn't sell chickens as I do most every day, and I also sell squabs every day, or most every day." (R.T., p. 21.)

In the following paragraph it is stated that obviously she does not derive her principal *income* from her poultry. Then under direct quotation marks: "She gets about $50 or $60 monthly altogether as profits," she says. But her husband gives her over $200.00 per month to cover house (without a comma) service and and everything; "she gets whatever she wants from him and whenever she needs money she gets it from him."

The following are the facts:

"Q. What is your husband's occupation, Mrs. Seix?

Mr. Silva: I object to that, your Honor.
The Court: I think it might be relevant. Proceed.

A. Well, he is a business man. I don't know.

Q. I mean what particular business has he been engaged in in the past year?

A. I know nothing of his business.

Q. Do you know how much his annual income is?

A. I don't know. I get what I want. That's all.

Q. And how much do you receive from him a year?

Mr. Silva: May I object again, your Honor? I don't see the relevancy of that question.

The Court: I think that is relevant.

Mr. Silva: I take an exception, your Honor.

A. Well, I couldn't exactly tell you. I know that whenever I need money, I get it.

Q. Could you tell us approximately how much?

The Court: Just give an estimate.

A. I couldn't tell you.

The Court: One hundred dollars a month, two hundred dollars a month?

A. When he has money I spend whatever I want, and when he hasn't I spend as little as possible. I couldn't tell you.

Q. You must be able to give some idea. Think, Mrs. Seix?

The Court: Do you get a substantial amount of money?

A. Do you include everything, house, service, everything?

The Court: Everything.

A. It is over $200.00 a month, or more, maybe." R. T., pp. 18, 19.)

To the foregoing it seems in order to add that what a housewife receives from her husband to pay for the expenses of the home, may not be classed as income.

Four paragraphs thereafter it is stated: "Although the schedules show no cash on hand she thereafter acquired the additional chickens and pigeons already mentioned." As to this remark, suffice it to state that in addition to being bought, chickens and utility pigeons are also raised, In fact, both definitions of poultry contemplate the raising thereof.

The following incorporated under paragraph C, entitled: "Appellant's Farming Operations in Vieques" is also challenged, as not being consonant with the facts of the case:

The first paragraph states that these refer to the sugar enterprise of Benitez Sugar Company and the so-called Community José J. Benítez e Hijos.

The following appears from the testimony produced by petitioner in that respect, which is the only testimony offered on the subject:

"Q. Now, Mrs. Seix, will you state what farming operations you are engaged in at the present time, or have been engaged in the past few years?

A. I have my farming operations in the Island of Vieques, and also I have a poultry business in Ponce.

Q. Now this poultry business in Ponce has no connection with your farms in the Island of Vieques?

A. None whatsoever.

Q. That is to say, you don't have any of your equipment or any of your stock of poultry over in Vieques, nor do you carry on any of the operations of your poultry business in Vieques?

A. None whatsoever; it is only in Ponce.

Q. Now, when you refer to your farms in Vieques, Mrs. Seix, do you refer to the properties which are owned in common by you, your father, your brother and your sisters and Mr. Gabriel Ferrer and his son that is known as the Comunidad Jose J. Benitez e Hijos?

A. Well, it used to be a community; there has not been a comunidad for two or three years, I think, now. We own the place, but there is no comunidad.

Q. Then I understand when you do talk about your farms in Vieques, you do refer to that community of property there which is owned by you and your father and brother and sisters?

A. I refer to the estate, that is, all the farms and whatever equipments there are.

Q. Now when you say estate, you mean the estate that you inherited from your mother, is that not right?

A. Exactly.

Q. And what was your mother's name?

A. Carlota Sampayo Guzman.

Q. Now, what participation or what intervention have you had in the farming operations connected with these properties in Vieques, Mrs. Seix?

A. Well, we have a manager there. I have received advances, but exactly what participation I have had I don't know.

The Court: He means what part have you taken in the farming operations?

A. Well, I am a proprietor. We have a manager.

Q. What control do you have in that?

A. We pay, I pay the manager.

The Court: You pay him from the products of the farm?

A. Yes.

A. You don't actually go over there and say "I want so many acres of gran cultura planted on this farm, or I want this plantation weeded"? You don't participate in the actual operation?

A. No, the manager does that.

Q. And you don't give directions to the manager?

A. No, the manager knows what he has to do. But I am an owner. I own it." (R. T., pp. 8, 9, 10.)

* * * * * * *

"Q. Now, Mrs. Seix, how much money have you received from the farming operations with respect to these properties in Vieques during the year 1933, 1934, 1935, 1936, 1937 and this year?

A. Let me think. You said I signed those papers in 1933?

Q. I am not sure.

A. If you are not sure, and you are the attorney, imagine me. If that, I have gotten $20,000 in benefit payments that the Secretary of Agriculture decided was mine, because of my farming operations.

Q. Who decided that?

A. The Secretary of Agriculture in Washington. I got $20,000.00.

The Court: You have received $23,000.00, then during that period?

A. Yes, sir: I received $3,000.00 first and $20,000.00 in 1937." (R. T. p. 13.)

* * * * * * *

"The Court: That doesn't make any difference. You were asked what amount of money you received and you said $23,000.00,—$3,000.00 when you signed this paper and $20,000.00 from the benefit payments.

A. Yes, sir.

Q. Now, Mrs. Seix, when you received that $20,000.00 you signed a certain agreement with other members of this community, did you not, with respect to the payment to you?

A. If my name is there, I must have signed it.

Q. I am asking you whether you did?

A. I cannot answer the question because I don't know what agreement you mean." (R. T., p. 14.)

* * * * * * *

"Q. Now, Mrs. Seix, how much money have you spent during that same period of years, from 1933 to 1938, inclusive, on the farming operations or on these properties in Vieques?

A. I couldn't answer that. The manager could answer you if you wish.

Q. Have you spent any of your money?

A. I guess so, because I am an owner of the place. I own part of it." (R.T., p. 15, 16.)

. . . . . .

Q. Mrs. Seix, did I understand you to testify that you do not personally pay for the taxes and the expenses of the enterprise Benitez Sugar Company?

A. Personally, I don't.

Q. What do you mean when you say that?

A. That I do not go there and pay the person, whoever has got to be paid, but I know from my income from whatever I own in Vieques taxes and everything are paid.

Q. By the manager?

A. By the manager. They are supposed to be paid, anyway.

Q. Do they charge you that?

Mr. Newsom: I object to that, your Honor.

The Court: Yes. Mrs. Seix has just stated, which is very clear, that she owes no debts other than the debts claimed against the Benitez Sugar Company and the properties formerly making up the comunidad; that she paid nothing personally for the operation expenses, taxes, or otherwise, but that whatever was paid for taxes or anything else was paid by the manager of these properties. That is a correct statement, it is not?

A. Yes, sir: but it is charged to us.

The Court: It doesn't make any difference whether it is charged to you or not, if your properties pay it. She has testified that she personally has paid nothing and that she owes nothing except such debts as may be owed by the Benitez Sugar Company, of which she is part owner, and by the Comunidad in which she is part owner. That is what I understand." (R.T., p. 20, 21.)

In addition to the foregoing, the following testimony was produced by Mr. Alfred E. Griffin, Manager of Respondent The Bank of Nova Scotia, as Witness for Respendent.

In referring to the checks originating from benefit payments and from which petitioner received the sum of $20,000.00 as "farmer-producer," Mr. Griffin said:

> "The first check of ten thousand dollars odd was made out in favor of Benitez Sugar Company, Carlota Benitez de Seix and Miguel Ferrer, Trustee for Jose J. Benitez Diaz, Arcadia Benitez Sampayo, Josefa Benitez Sampayo, Jose J. Benitez Sampayo, Gabriel Ferrer Otero and Gabriel Ferrer Benitez, *successors to Comunidad Jose J. Benitez e Hijos.* The second check of ninety-one thousand odd dollars was made out in exactly the same form with the exception that included in the list of payees was the name The Bank of Nova Scotia." (R.T., p. 24, 25) (Emphasis or underscoring supplied.)

Having cited extensively from the testimony produced by petitioner herein AS WITNESS FOR THE BANK OF NOVA SCOTIA, it seems in order to show the opinion that the Hon. Robert A. Cooper, the trial Judge, expressed at the end of her testimony:

> "The Court: I don't see any reason to postpone the case to testify as to that. Mrs. Seix has testified, and testified very frankly, and I haven't any doubt that everything she says is true." (R.T., p. 34.)

To what has been heretofore stated we desire to add that there are various other statements incorporated in said appendix which are likewise unsupported by the facts, as well as others which partake more of eminent counsel's desires than of sheer reality. At any rate, the statements referred to do not appear and could not appear from the record. We are simply bringing this reply brief to an end because the airmail closes shortly and we desire to touch upon still another feature.

It Is Respectfully Submitted That Should the Decision and Decree Complained of Be Reversed, Mandate Should Issue Directly to the District Court, Pursuant to Statute.

Much stress is laid by eminent counsel for the Respondent in that part of his final brief entitled "Petitioner's Brief" in support of his viewpoint to the effect that in case the decree complained of should be reversed, the cause should be remanded to the Circuit Court of Appeals and not to the District Court of the United States for Puerto Rico, as prayed for.

At the time that the undersigned local counsel prepared the final brief for petitioner filed herein, he had not as yet had occasion to go carefully into the question, although he was quite certain, from general knowledge of the subject, that our prayer was justified in every respect. In the meantime we have had occasion to go thoroughly into the proposition and find that, as anticipated, the law and the jurisprudence interpreting same are on our side.

U. S. Code, Title 28, Section 877, which is the statute having application, in its pertinent part, reads as follows:

> ". . . And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause SHALL BE REMANDED by the Supreme Court to THE PROPER DISTRICT COURT for further proceedings in pursuance of such determination." (Capitals supplied.)

From the foregoing it seems quite evident that where a cause is heard in this Court, by review of a decision and decree or judgment of a circuit court of appeals, the mandate issues to the district court.

The only qualification placed by this Court on that portion of the statute just cited is that wherever certiorari is SUSTAINED SOLELY on the ground that matters properly presented to the circuit court of appeals for its con-

sideration have not, in fact, been considered or reviewed by the circuit court, the remand from this Court will be to the circuit court of appeals with instructions to that court to proceed to a further consideration of the cause. That, in effect, is the procedure followed in the case of *American Surety Company of New York* v. *Marotta*, 287 U. S. 513, cited and relied upon by eminent counsel for the respondent. (To same effect *Lutcher Moore Lumber Co.* v. *Knight*, 217 U. S. 257; *Twist* v. *Prairie Oil Co.*, 274 U. S. 684 and *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792.) In the absence of that, and only that condition precedent, the mandate from this Court only goes to the circuit court of appeals when the certiorari or appeal is dismissed.

Needless to say that in the present case, respondent not having seasonably filed a cross petition, there is nothing to sustain, solely or otherwise, in case of reversal, as far as respondent is concerned.

We respectfully pray this Court that for the reasons aforesaid, petitioner herein may be granted leave to file this reply brief, to be presented to this Court jointly with the final brief for petitioner previously filed herein, upon the case being called for argument; that petitioner herein be granted leave to submit her case on said final brief and on this reply brief, without presenting oral argument and that the prayer of her said final brief, which is reproduced by reference at this point, be granted.

Respectfully submitted,

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FRANCISCO CAPO PAGAN (Ponce, P. R.).
Of Counsel.

Ponce, Puerto Rico, April 3rd, 1941.